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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JANICE SHARP et al.,

Plaintiffs and Appellants,

v.

PAUL ANDERSON et al.,

Defendants and Respondents.

B214147

(Los Angeles County
Super. Ct. No. GC034608)

APPEAL from orders of the Superior Court of Los Angeles County, Jan A. Pluim, Judge. Dismissed.

Knapp, Petersen & Clarke and Kevin J. Stack for Plaintiffs and Appellants.

Ernster Law Offices, John H. Ernster, Katharine A. Miller and Ryan K. Marden for Defendants and Respondents Paul Anderson and Elizabeth Anderson.

Gordon & Rees, M. D. Scully, Christopher B. Cato and Eric M. Volkert for Defendants and Respondents the Alta San Rafael Association, Marilyn Buchanan, Charles Malouf, Ann Longyear and John Craig.

I. INTRODUCTION

Plaintiffs, Janice Sharp and Dane Hoiberg, purport to appeal from orders and modifications of judgments entered on December 3, 2008, in favor of defendants: Paul Anderson and Elizabeth Anderson (the Andersons); and the Alta San Rafael Association, Marilyn Buchanan, Charles Malouf, Ann Longyear and John Craig (collectively, the Association). We dismiss the appeal as untimely, and principles of res judicata would bar relief in any event.

II. BACKGROUND

The trial court entered a judgment in favor of the Association on February 5, 2008. The judgment stated in part, “The [Association] Defendants shall recover from Plaintiffs their allowable costs in this suit. The [Association] Defendants’ entitlement to attorneys’ fees, if any, shall be determined by a separate motion.” The Association served notice of entry of the judgment on February 20, 2008. On April 18, 2008, the Association filed a motion for \$291,379.50 in attorney fees. On May 5, 2008, the Association filed a memorandum of costs seeking \$14,379.05. On June 5, 2008, the trial court continued the attorney fees motion to August 4 and ordered the Association “to file and serve detailed documentary evidence in support of their claimed fees.” The Association filed the requested detailed documentary evidence on July 11, 2008.

The trial court entered a summary judgment in favor of the Andersons on July 1, 2008. The judgment stated in part: “Defendants Paul Anderson and Elizabeth Anderson may recover from plaintiffs their allowable costs of suit. The entitlement of defendants Paul Anderson and Elizabeth Anderson to attorney’s fees, if any, shall be determined by a separate motion.” The Andersons filed an attorney fee and costs motion on July 14,

2008. They sought a total of \$207,673.27. In response, plaintiffs filed an August 4, 2008 motion to tax costs.

The trial court ruled on both the Association's and the Andersons' attorney fee and cost requests on October 1, 2008. The trial court issued an October 1, 2008 minute order: granting plaintiffs' motion to tax costs in part; awarding \$184,510.18 in attorney fees and \$14,109.03 in costs to the Andersons; and awarding \$295,547.50 in attorney fees to the Association. The minute order contains a "Clerk's Certificate of Mailing/Notice of Entry of Order," indicating it was served on the parties on October 1, 2008. Plaintiffs filed a November 26, 2008 notice of appeal. We affirmed the orders. (*Sharp v. Anderson* (B212528, Feb. 18, 2010) [nonpub. opn.].)

On December 3, 2008, the trial court entered: a written order on the Andersons' attorney fee and costs motion and plaintiffs' motion to tax costs; and a separate written order on the Association's attorney fee motion. Also on December 3, 2008, the trial court modified the judgments in favor of the Andersons and the Association to reflect the attorney fee and cost awards. On February 10, 2009, plaintiffs filed notice of the present appeal from the trial court's December 3, 2008 actions.

III. DISCUSSION

This is a second appeal from attorney fee and cost orders that have already been affirmed by this court. This appeal is untimely. The post-judgment orders awarding attorney fees were entered on October 1, 2008. The October 1, 2008 minute order was entitled "CLERK'S CERTIFICATE OF MAILING/NOTICE OF ENTRY OF ORDER." The minute order recites that it was mailed to the parties on October 1, 2008. The October 1, 2008 minute order triggered the jurisdictional time to appeal; notice of appeal had to be filed within 60 days. (Cal. Rules of Court, rule 8.104(a); *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 221-222; see *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 900-902.) California Rules of Court rule 8.104(a) states in part: "Unless a statute or rule 8.108 provides otherwise, a notice of appeal *must* be filed

on or before the *earlier* of: [¶] (1) 60 days after the superior court clerk serves the party filing the notice of appeal with a document entitled ‘Notice of Entry’ of judgment or a file-stamped copy of the judgment, showing the date either was served.” (Italics added.) California Rules of Court rule 8.108 extends the time to appeal in certain circumstances not applicable here, including when a new trial or judgment notwithstanding the verdict motion is filed. The present appeal was filed on February 10, 2009, which was more than 60 days after October 1, 2008. When a notice of appeal is filed late, this court lacks jurisdiction and must dismiss the appeal. (Cal. Rules of Court, rule 8.104(b); *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56; *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674; *Torres v. City of San Diego, supra*, 154 Cal.App.4th at pp. 221-222.) Because an appealable order had already been entered, and a written order prepared by counsel was not required, the written orders entered on December 3, 2008 did not create a new opportunity to appeal. (*In re Marriage of Adams* (1987) 188 Cal.App.3d 683, 688-689; Eisenberg, et al., Cal. Practice Guide: Civil Appeal & Writs (The Rutter Group 2009) ¶ 3:49, p. 3-23; see *Cuenllas v. VRL Int’l, Ltd.* (2001) 92 Cal.App.4th 1050, 1053-1054; *Hughey v. City of Hayward* (1994) 24 Cal.App.4th 206, 209-210.) In addition, the December 3, 2008 modifications of the judgments were not substantial and did not constitute entry of new judgments from which an appeal may be taken; the judgments were merely modified to reflect the awards made in the October 1, 2008 minute order. (*Torres v. City of San Diego, supra*, 154 Cal.App.4th at p. 222; see *Nestle Ice Cream Co., LLD v. Workers’ Comp. Appeals Bd.* (2007) 146 Cal.App.4th 1104, 1109-1110; *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1080-1081 & fn. 11; *ECC Const., Inc. v. Oak Park Calabasas Homeowners Assn.* (2004) 122 Cal.App.4th 994, 1003, fn. 5; *CC-California Plaza Associates v. Paller & Goldstein* (1996) 51 Cal.App.4th 1042, 1048.) And even if the present appeal were jurisdictionally effective, plaintiffs would not be entitled to two bites of the apple. Our decision in *Sharp v. Anderson, supra*, would be res judicata. (See *People v. Barragan* (2004) 32 Cal.4th 236, 252-253 *Slater v.*

Blackwood (1975) 15 Cal.3d 791, 795; *Clark v. Leshner* (1956) 46 Cal.2d 874, 880; *Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 637.)

IV. DISPOSITION

The appeal is dismissed as untimely. Defendants, Paul Anderson, Elizabeth Anderson, the Alta San Rafael Association, Marilyn Buchanan, Charles Malouf, Ann Longyear and John Craig, are to recover their costs on appeal jointly and severally from Janice Sharp and Dane Hoiberg.

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WEISMAN, J.*

We concur:

ARMSTRONG, ACTING P. J.

KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.